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No. 94-

IN THE
Supreme Court Of The United States
October Term, 1994

JOHN PETER GALANIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

A panel of the United States Court of Appeals for the Second Circuit affirmed the decision of the Honorable Charles L. Brieant, which adopted the report and recommendation of Magistrate Judge Martin R. Goldberg recommending that John Peter Galanis was not entitled to relief under 28 U.S.C. § 2255 for an asserted violation of Fed. R. Crim. P. 32(c)(3)(D).

The questions presented are:

whether, in accord with decisions of five circuit courts of appeal, a sentencing court's violation of Federal Rule of Criminal Procedure 32(c)(3)(D) (which requires the court to resolve or to disclaim reliance on disputed allegations in the presentence investigation report ("PSR")) may be raised for the first time in an application under 28 U.S.C. § 2255, when the violation did not actually prejudice the petitioner until after the time for filing a direct appeal had expired, at which time prison and/or parole authorities relied on the disputed allegations.

whether, in accord with the plain language of Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure, a defendant must "allege any factual inaccuracy" in the PSR, rather than raise "grave doubt" as to the inaccuracy, to preserve his objections before the sentencing court.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals for the Second Circuit were John Peter Galanis and the United States of America.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

No. 94-

JOHN PETER GALANIS,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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John Peter Galanis petitions for a writ of certiorari to review the judgment of a panel of the United States Court of Appeals for the Second Circuit affirming the denial of Petitioner's application for relief pursuant to 28 U.S.C. § 2255.

OPINIONS BELOW

The order of the Court of Appeals denying the petition for rehearing is reprinted in the Appendix to this petition, infra, at A1-A2. The order of the Court of Appeals affirming the decision of the Honorable Charles L. Brieant is reprinted in the Appendix to this petition, infra, at B1-B3. The memorandum and order of the Honorable Charles L. Brieant affirming and adopting the Report and Recommendation of Magistrate Judge Martin R. Goldberg is reprinted in the Appendix, infra, at C1-C2. The Report and Recommendation of Magistrate Judge Martin R. Goldberg is reprinted in the Appendix, infra, at D1-D11.

JURISDICTION

The Court of Appeals entered its judgment on July 25, 1994. The Court of Appeals denied the petition for rehearing by John Peter Galanis on September 29, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction of the district court was invoked under 28 U.S.C. § 2255.

RULES AND STATUTORY PROVISIONS INVOLVED

1. Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure provides as follows:

> (D) If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to

> each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written report of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission.

2. 28 U.S.C. § 2255 provides, in relevant part, as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
> A motion for such relief may be made at any time.
> . . .

STATEMENT OF THE CASE

This case presents an issue that goes to the heart of Rule 32(c)(3)(D) of the Federal Rules of Criminal Procedure, which governs the sentencing court's duty to resolve or disclaim reliance on disputed allegations in a convicted defendant's Presentence Investigation Report ("PSR"). The Rule is designed to ensure that if the Bureau of Prisons or the Parole Commission relies on allegations in the PSR when making a decision regarding an inmate, those allegations have been resolved by the sentencing court; thus, the Rule aims to prevent prisoners from being prejudiced by erroneous information in essentially unreviewable administrative decisions. Advisory Notes to 1983 Amendment of Rule 32. Compared to other rules of criminal procedure, therefore, the Rule is uniquely concerned with what happens to a convicted defendant after sentencing.

The issue in this case is whether a defendant may assert a violation of Rule 32(c)(3)(D) after the occurrence of the precise evil that the Rule was designed to prevent. By the time prison or parole authorities rely on allegations in a PSR,[1] the defendant's time for filing a direct appeal will likely have expired, and the only vehicle for asserting the claim will be an application pursuant to 28 U.S.C. § 2255. For this reason, panels of at least five courts of appeal have permitted Rule 32(c)(3)(D) claims to be raised in applications

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[1] Although the Sentencing Guidelines do not permit defendants to be paroled with respect to crimes committed after November 1, 1987, prison authorities continue to make significant penal decisions based on presentence reports.

under § 2255. A number of other courts of appeal have issued contrary decisions, however, holding that a federal inmate may not assert a violation of Rule 32(c)(3)(D) under § 2255 for one of two related reasons. Some courts have held that the claim is not "cognizable" in such a petition because it is technical or procedural rather than constitutional, jurisdictional, or fundamental. The Court of Appeals for the Second Circuit so held in this case even though the Parole Commission's reliance on the disputed but unresolved information caused a substantive error that fundamentally prejudiced the petitioner: the Commission set a release date more than three times more distant than that provided for by its own then-applicable parole guidelines, mandating that the petitioner serve at least 15 years in prison based on convictions for tax and securities offenses. Other courts have held a violation of Rule 32(c)(3)(D) may not be asserted by way of § 2255 because the claim is procedurally barred by the defendant's failure to assert it on direct appeal. To the extent that the Court of Appeals so held in this case, its holding ignored the fact that the petitioner had not taken a direct appeal from the judgment of conviction and, therefore, was not attempting a "second bite at the apple."

Under either rationale, the Court of Appeals' holding in this case amounts to a statement that a Rule 32(c)(3)(D) violation may not be asserted by way of § 2255 after the occurrence of the precise prejudice that the Rule was designed to prevent, but may only be asserted by way of "preemptive strike." Because this holding undermines Rule 32(c)(3)(D), is contradicted by precedent in at least five other circuits, and wastefully requires defendants to raise Rule 32(c)(3)(D) violations on direct appeal even if they do not intend to appeal any other aspect of their conviction, this important question should be resolved by the Court.

This case involves a second issue on which the Court of Appeals for the Second Circuit diverged not only from other circuit courts but also from the clear language of Fed. R. Crim. P. 32(c)(3)(D). The issue is whether a defendant must raise "grave doubt" as to allegations in the PSR merely to preserve objections pursuant to Rule 32. The Court of Appeals answered this question in the affirmative, requiring defendants to prepare to litigate every inaccuracy in a PSR before knowing whether the sentencing court intends to rely on the disputed information. This wasteful result should be corrected by the Court.

STATEMENT OF FACTS

The Sentencing Court Failed To Address Many Of Mr. Galanis' Objections To The PSR Even Though They Were Submitted To The Court In Writing And Asserted At Sentencing

John Galanis is a federal inmate who was severely prejudiced by disputed but unresolved information in the Probation Department's PSR when the Parole Commission relied on that information, in part, to declare him ineligible for parole until he had served 15 years of his sentence. The decision will require Mr. Galanis to serve a sentence more than three times as long as that indicated by the Parole Commission's parole guidelines, and longer than the average murderer or drug dealer sentenced in 1988. C1-2.

Mr. Galanis was convicted of various tax and securities offenses on July 5, 1988, in a case to which the United States Sentencing Guidelines did not apply. D2. Mr. Galanis' probation officer then prepared a presentence report

("PSR") that grossly exaggerated the loss caused by Mr. Galanis' offenses. In the PSR, the probation department claimed that "[t]he amount of money suffered by the victims . . . approaches the $100 million range." A 42.[2] The government derived much of this figure by estimating that improper federal income tax deductions generated by the offenses resulted in a $78 million loss to the fisc. A51, 79. In his Reply to the Government's Sentencing Memorandum ("GSM"), Mr. Galanis explained that even under the government's theory of the tax case, the offenses were "designed to result in a deferral of taxes only." A 129. Because the scheme involved tax deferral, rather than tax evasion, the government could not, would not, and did not lose $78 million in taxes, but rather a few years' interest on $78 million, which is a small fraction of $78 million.[3] The PSR also included several errors concerning Galanis' criminal history, to which Mr. Galanis also objected in his reply to the GSM. A 134. At sentencing, Galanis' counsel reiterated these objections on the record by explaining, in response to a question from the bench, that his objections to the PSR were set forth in his reply to the GSM. A 139.

Although the sentencing court addressed certain other objections set forth in Mr. Galanis' reply to the GSM, it failed to address these specific and detailed objections

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[2] Citations to "A _" are to the joint appendix filed in the Court of Appeals.

[3] In the proceedings below, the government has never attempted to defend the PSR's estimation of the loss. Nor has the government ever contended that the sentencing court made a finding as to the value of the loss.

regarding the amount of loss. The court then sentenced Mr. Galanis to a term of imprisonment of 27 years. D2. In the pre-Guidelines regime, this sentence made Mr. Galanis eligible for parole after serving 9 years, or one-third of the sentence. A 162-64.

Mr. Galanis did not appeal his judgment of conviction. D2. Thereafter, in response to a Rule 35 application, the trial court gave the Parole Commission the discretion to release Galanis on parole at any time. D2-3.

Mr. Galanis Was Severely Prejudiced By The Objectionable Allegations When The Parole Commission Decided His Presumptive Release Date

The Parole Commission decided that Mr. Galanis would not be eligible for parole until he had been imprisoned for 15 years (or 180 months), even though its own then applicable guidelines prescribed a presumptive release date of 40-52 months. A 185, 186, 192. As a result of this decision, Mr. Galanis stands to serve a longer sentence than the average murderer or drug dealer sentenced in 1988. C1-2. The Parole Commission's decision was explicitly based on disputed allegations in the PSR. Indeed, the Parole Commission relied heavily on the government's unsupportable loss estimation at all three levels of administrative review. A 181, 183, 187, 190-91.

The Decisions Of The Lower Courts

After the Parole Commission relied on the erroneous and disputed but unresolved allegations in the PSR, Mr. Galanis brought the § 2255 application that is the subject of

this petition for certiorari, requesting that he be resentenced because of the Rule 32(c)(3)(D) violations committed by the sentencing court. Magistrate Judge Martin R. Goldberg recommended that the sentencing court deny the application on the grounds that any errors could not be raised by way of an application under § 2255, and, even if they could, the petitioner waived his objections by failing to raise "grave doubt" as to the allegations before the sentencing court. D9. In an opinion dated February 7, 1994, the district court stated that it was "justifiably concerned with the actions of the Parole Commission in this Old Law case, which have required movant to serve way beyond the guidelines. . . ." C1-2. Nevertheless, the court adopted and affirmed the magistrate judge's report. Id. On July 25, 1994, a panel of this Court affirmed the district court's decision for "substantially the reasons stated in the thorough opinion of Magistrate Judge Goldberg." B2. On September 29, 1994, the Court of Appeals for the Second Circuit denied Mr. Galanis' petition for rehearing en banc. A2.

REASONS FOR GRANTING THE WRIT

This case presents a legal issue on which the courts of appeal are split and which has important practical implications for criminal practice, as well as for the continued vitality of 28 U.S.C. § 2255. If criminal defendants cannot raise violations of Rule 32(c)(3)(D) by way of § 2255, then they will not be able to raise the violations after prison and/or parole authorities rely on the disputed but unresolved allegations in the PSR, the precise evil addressed by the Rule. Instead, defendants will be forced to raise the errors on direct appeal, even if they do not intend to appeal any other aspect of their judgment of

conviction. Because the violations may never affect the prisoners, such a rule wastes judicial resources. Such a rule also threatens the continued vitality of § 2255. In applications under § 2255, defendants generally may not raise either violations that were litigated on direct appeal or violations that were not litigated on direct appeal (but could have been). As a result, claims that depend on facts or law that postdate a defendant's conviction are currently virtually the only types of claims that may be raised in such an application. Violations of Rule 32(c)(3)(D) that prejudice an inmate before prison or parole authorities epitomize such claims.

I. Rule 32(c)(3)(D) Violations May Be Raised By Way Of 28 U.S.C. § 2255 After The Petitioner Has Been Actually Prejudiced By The Violation

A. The Courts of Appeal Are Split On This Issue

Panels of a majority of the circuits that have considered the question -- the Sixth, Eighth, Ninth, Tenth, and Eleventh -- have held that a Rule 32(c)(3)(D) violation may be raised in an application under § 2255 after the petitioner has become aware of its prejudicial effect, even if it was not previously raised on direct appeal (or in a motion under the then applicable version of Rule 35).[4] See United

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[4] Although defendants could raise violations of Rule 32(c)(3)(D) under a prior version of Rule 35, they cannot under the version applicable to offenses committed after November 1, 1987.

States v. Sarduy, 838 F.2d 157, 158 (6th Cir. 1988); Kramer v. United States, 788 F.2d 1229 (7th Cir. 1986); Poor Thunder v. United States, 810 F.2d 817, 822-23 (8th Cir. 1987); United States v. Gattas, 862 F.2d 1432, 1433-34 (10th Cir. 1988); United States v. Fischer, 821 F.2d 557, 558-59 (11th Cir. 1987).[5] With the Court of Appeals' decision in this case, panels of four circuits in published decisions -- the Second, Fourth, Fifth, and Ninth -- have reached the opposite conclusion and precluded the petitioner from asserting the Rule 32(c)(3)(D) violation under § 2255. See United States v. Emanuel, 869 F.2d 795, 796 (4th Cir. 1989); United States v. Smith, 844 F.2d 203, 207 (5th Cir. 1988); United States v. Schlesinger, 38 F.3d 485 (9th Cir. 1994).[6]

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[5] But see, e.g., United States v. Warner, 23 F.3d 287, 291 (10th Cir. 1994); Martorana v. United States, 873 F.2d 283, 284 (11th Cir. 1989).

[6] The Second Circuit's reasoning was somewhat different from that of the other circuits; the panel affirmed the decision of the magistrate which held that violations of Rule 32(c)(3)(D) are not cognizable in applications under 28 U.S.C. § 2255 because they are not "constitutional, jurisdictional, or in some other way fundamental." D4-6. By contrast, in the other cited decisions, the courts held that the defendant could not raise the Rule 32(c)(3)(D) violation because the failure to raise it constituted a procedural default which the prisoner could overcome only by showing "cause" and "prejudice." Emanuel, 869 F.2d at 796; Smith, 844 F.2d at 207; Schlesinger, 38 F.3d at 487-88. Despite this distinction in reasoning, the holdings are equivalent: Rule 32(c)(3)(D) violations may not be raised collaterally.

All of the courts of appeal that have considered violations of Rule 32(c)(3)(D) cognizable in applications under § 2255 have recognized that the failure to resolve or disclaim reliance on disputed allegations in the presentence report can have profoundly substantive effects on post-sentencing determinations by prison and parole administrators. These courts of appeal have further recognized that such a violation is simply not the sort of claim that must be raised on direct appeal, particularly when the defendant has not taken any direct appeal from the judgment of conviction. A defendant should not be required to raise such a claim only on direct appeal because:

> 1) a violation of Rule 32(c)(3)(D) may not become apparent or prejudicial until long after sentencing, when the defendant becomes eligible for parole or prison authorities otherwise rely on the PSR, Kramer, 788 F.2d at 1231; Gattas, 862 F.2d at 1434-35;
>
> 2) when the defendant has not taken any direct appeal, raising the error in a Section 2255 petition does not constitute an impermissible second appeal or an impermissible tactical attempt to withhold a claim until later, see Fischer, 821 F.2d 557 (allowing claim in § 2255 petition when defendant had not taken any direct appeal at all); and
>
> 3) the government's interest in restricting collateral applications for relief is protected by the fact that in an application under § 2255 the petitioner may raise only errors that are jurisdictional, constitutional or fundamental, whereas on direct appeal the petitioner could have raised any error. This rule prevents

> defendants from raising merely procedural violations of Rule 32(c)(3)(D) and limits collateral relief to substantive violations that have prejudiced the defendant. See, e.g., Hill v. United States, 368 U.S. 424, 429, 82 S.Ct. 468, 472, 7 L.Ed.2d 417 (1962) (purely procedural failure to allow defendant to speak at sentencing was not cognizable under § 2255); Johnson v. United States, 805 F.2d 1284 (7th Cir. 1986) (violation based on sentencing court's failure to allow defendant personally to read PSR not cognizable when his attorney did, and sentencing court did not rely on contested information).

Despite these persuasive reasons, the courts of appeal remain split on this question.

B. The Issue Is Important To Criminal Practice And The Continued Vitality Of 28 U.S.C. § 2255

The issue is important to criminal practice because numerous convicted defendants will face the decision whether to appeal their conviction based solely upon inaccuracies in the PSR. If a Rule 32(c)(3)(D) violation is not cognizable on collateral review, then every defendant must raise any such claim on direct appeal, even if the defendant does not otherwise intend to challenge his conviction or sentence. Because the error may never prejudice the defendant, this course wastes judicial resources. As a result of the split in the circuits, however, it is unclear whether criminal defendants are obliged to raise Rule 32(c)(3)(D) errors in a direct appeal. By resolving this question, the Court can provide much-needed guidance to defense counsel and judges.

The issue is also important because Rule 32(c)(3)(D) claims are one of the few types of claims that courts have permitted under 28 U.S.C. § 2255. Collateral relief pursuant to § 2255 is already virtually unavailable as a result of the intersection of two rules. The first rule is that federal prisoners cannot raise claims that have already been decided on direct appeal. Giacalone v. United States, 739 F.2d 40, 42 (2d Cir. 1984). The second rule is that federal prisoners also cannot raise claims that have not been argued and decided on direct appeal (unless they can show "cause" for the procedural default and "prejudice" therefrom). United States v. Frady, 456 U.S. 152, 102 S. Ct. 1584, 71 L.Ed.2d 816 (1982). If § 2255 petitioners are precluded from raising claims that have been decided on direct appeal, as well as claims that have not been decided on direct appeal, then Section 2255 encompasses very few claims. Specifically, it will encompass only cases in which circumstances change after trial (e.g., where new evidence has been discovered or the governing law has changed), or cases in which the prisoner can show cause for and prejudice from the procedural default. Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin, and David L. Shapiro, Hart and Wechsler's The Federal Courts and The Federal System (3d Ed. 1988) at 1585.

In Rule 32(c)(3)(D) cases, circumstances have generally changed after trial; as discussed above, parole and prison authorities may rely on disputed but unresolved information in the PSR long after the time for filing a direct appeal has expired. Because the purpose of the Rule is to ensure that the defendant's rights are not violated after sentencing and after the time for filing a direct appeal has run, Rule 32(c)(3)(D), compared to other rules of criminal procedure, is uniquely concerned with the post-sentencing

actions of the Parole Commission and prison authorities. See Advisory Committee Notes to 1983 Amendment of Rule 32(c)(3)(D); Poor Thunder, 810 F.2d at 826; Ochoa v. United States, 819 F.2d 366, 372 (2d Cir. 1987). Therefore, a violation of Rule 32(c)(3)(D) that severely prejudices the petitioner before parole or prison authorities is precisely the sort of claim that should be cognizable on collateral review.[7]

II. The Plain Language Of Rule 32(c)(3)(D) Does Not Require A Defendant To Raise "Grave Doubt" Regarding The Accuracy Of The PSR Merely To Preserve His Objections

The Court of Appeals held that, even if Galanis' claim were cognizable, the sentencing court did not need to satisfy Rule 32(c)(3)(D) because Galanis' objections were "neither specific nor detailed enough to raise grave doubt as to the veracity of the information actually contained in the

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[7] For these reasons, the fact that the Parole Commission's determination precipitated this petition is no reason to hold that the claim should not be cognizable. Because inmates have only limited due process rights before prison authorities and the Parole Commission, Wolff v. McDonnell, 418 U.S. 539, 555-56, 94 S. Ct. 2963, 2974-75, 41 L.Ed.2d 935 (1974), it is essential that the information relied upon by those authorities be tested by the adversarial process in court. In addition, Mr. Galanis is precluded from challenging either the Parole Board's exercise of discretion or its frustration of the sentencing court's intent. See United States v. Addonizio, 442 U.S. 178, 190, 99 S.Ct. 2235, 2243, 60 L.Ed.2d 805 (1979).

presentence report and Judge Brieant's reliance thereon." D9 (emphasis supplied). This holding violates the plain language of Rule 32(c)(3)(D) and case law in numerous jurisdictions. Rule 32(c)(3)(D) mentions no "grave doubt" standard but merely requires the defendant to "allege any factual inaccuracy" in the PSR. Moreover, although in some circuits the "grave doubt" standard determines whether, in a post-sentencing proceeding, the defendant has made out a violation of his constitutional right to be sentenced on the basis of accurate information, we are aware of no circuit in which the standard determines whether the defendant has preserved his Rule 32 objections before the sentencing court. See United States v. Eschweiler, 782 F.2d 1385, 1387 n. 6 (7th Cir. 1986). Before the sentencing court, a defendant fails to allege any inaccuracy within the meaning of Rule 32 only when he makes no specific objections whatsoever. See, e.g., United States v. Aleman, 832 F.2d 142, 145 (11th Cir. 1987) (defendant waived any objections when objected only to "tone" and "version"); United States v. Hurtado, 846 F.2d 995, 998 (5th Cir.) (defendant waived objections when merely stated that PSR was "big mistake"), cert. denied sub nom. Aguas v. United States, 488 U.S. 863 (1988); United States v. Petty, 798 F.2d 1157, 1162 (8th Cir. 1986) (defendant waived objections to PSR because objection was "vague and cryptic . . . comment [that did] not allege any specific inaccuracies"), vacated on other grounds, 481 U.S. 1034 (1987).

This error has wasteful practical implications for the district courts. Defendants should not be required to marshall evidence to counter allegations in the PSR before knowing whether the sentencing court intends to rely on the disputed allegations. Notably, Rule 32(c)(3)(D) does not require an evidentiary hearing on all disputed matter from

the presentence report; it gives the court the discretion to allow the defendant either to comment on the report, or to submit affidavits or other documents, or to participate in a full-blown evidentiary hearing. United States v. Petitto, 767 F.2d 607, 611 (9th Cir. 1985), overruled on other grounds, United States v. Fernandez-Angulo, 897 F.2d 1514, 1517 n. 5 (9th Cir. 1990). The Second Circuit's holding would essentially change this rule in that it would require defendants to prepare for hearings regarding contested allegations in the PSR merely to preserve their objections.[8]

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[8] The Court of Appeals also held that the sentencing court did not need to consider the objections stated in the Reply to the GSM and referenced at the sentencing hearing because the objections were not addressed exclusively to the PSR. D8-9. But the Rule does not require the defendant to object in a document titled "Objections to the PSR"; rather, the Rule requires the sentencing court to resolve allegations of factual inaccuracy raised virtually anywhere in the record, broadly including 1) "the comments of the defendant and the defendant's counsel," 2) "testimony," or 3) "other information introduced by them." Thus, objections to the PSR need not be specifically designated as such. See, e.g., United States v. Rosa, 891 F.2d 1063, 1071-72 (3d Cir. 1989) (objections to information contained in prosecutor's version of offense sufficient to allege error under Rule 32(c)(3)(D)); United States v. Mejia, 824 F.2d 360, 368-69 (5th Cir.) (objections to information contained in government's sentencing memorandum sufficient to allege error under Rule 32(c)(3)(D)), cert. denied, 484 U.S. 957 (1987). Moreover, because the GSM and the PSR generally include much of the same information, a defendant can efficiently object to allegations in both documents

CONCLUSION

For the foregoing reasons, Petitioner John Peter Galanis respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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simultaneously. By requiring defendants to submit a separate document that must attempt to raise grave doubt regarding every disputed allegation in the PSR, the Second Circuit's holding threatens to overwhelm criminal defendants who have already endured a trial, not to mention the judges that sentence them.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 29th day of September, one thousand, nine hundred and ninety-four.

JOHN PETER GALANIS,

Petitioner-Appellant,

v.

DOCKET
No. 94-2097

UNITED STATES OF AMERICA,

Respondent-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by pro se appellant, John Peter Galanis,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, CLERK

By: /s/ _____
Carolyn Clark Campbell
Chief Deputy Clerk

SDNY
Brieant
JMW 93 CV 3194

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of July, one thousand, nine hundred and ninety-four.

Present:

Honorable John M. Walker, Jr.,
Honorable Joseph M. McLaughlin,
Honorable Dennis G. Jacobs,
Circuit Judges.

JOHN PETER GALANIS,

Petitioner-Appellant,

v.

ORDER
No. 94-2097

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of New York (Brieant, J.) and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

Petitioner John Peter Galanis appeals from denial of his writ of habeas corpus pursuant to 18 U.S.C. § 2255. Petitioner argues that the district court during the sentencing proceedings in his underlying conviction failed to resolve certain disputed facts reported in the presentence report ("PSR"), and that this failure has detrimentally impacted him before the Parole Commission.

We affirm for substantially the reasons stated in the thorough opinion of Magistrate Judge Goldberg dated December 21, 1993, as adopted and affirmed in its entirety by District Judge Brieant in an order dated February 7, 1994.

Accordingly, the judgment of the district court is affirmed.

/s/ _____
Hon. John M. Walker, Jr., U.S.C.J.

/s/ _____
Hon. Joseph M. McLaughlin, U.S.C.J.

/s/ _____
Hon. Dennis G. Jacobs, U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN PETER GALANIS,	:
Plaintiff,	: MEMORANDUM AND ORDER
-against-	: 93 Civ. 3194 (CLB)
THE UNITED STATES OF AMERICA,	: [87 Cr. 520]
Defendant.	:

Brieant, J.

This motion pursuant to 28 U.S.C. Section 2255 to vacate sentence, and resentence under Rule 32 F. R. Crim. P. was duly referred to the Hon. Martin R. Goldberg, United States Magistrate Judge, to hear and report, and the Magistrate Judge thereafter filed his Report and Recommendation, dated December 21, 1993. Familiarity with that Report on the part of the reader is assumed.

Objections have been taken to the Report on behalf of Mr. Galanis. This Court has considered the objections.

Finding no error, the Report of the Magistrate Judge is adopted and affirmed.

While the movant, and indeed the Court, are justifiably concerned with the actions of the Parole Commission in this Old Law case, which have required movant to serve way beyond the guidelines, and more than the average drug dealer or murderer sentenced in 1988, neither the Magistrate Judge nor this Court finds a legal basis to require that movant be resentenced.

So Ordered.

Dated: White Plains, New York
February 7, 1994

/s/
Charles L. Brieant
U.S.D.J.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

JOHN PETER GALANIS,

Plaintiff,

-against-

THE UNITED STATES OF AMERICA,

Defendant.
----------x

REPORT AND RECOMMENDATION

93 Civ. 3194 (CLB)(MRG)

TO: THE HONORABLE CHARLES L. BRIEANT

Movant, John Peter Galanis, pursuant to Title 28, United States Code, Section 2255, seeks to vacate his sentence and seeks to be resentenced pursuant to Rule 32 of the Federal Rules of Criminal Procedure.

Indictment S 87 Cr. 520 (CLB) was filed on September 15, 1987 in fifty-eight (58) counts charging John Peter Galanis and six (6) others with conspiring to commit tax fraud, conspiring to conduct the affairs of a racketeering enterprise through a pattern of racketeering activity (in violation of Title 18, United States Code, Section 1962 (d),

Securities Fraud, Interstate Travel with the intent to commit securities fraud, traveling interstate to promote unlawful activities, namely commercial bribery, and criminal contempt. On July 5, 1988, after a thirteen (13) week jury trial before the Honorable Charles L. Brieant, then Chief Judge, the jury returned verdicts of guilty against John Peter Galanis on the racketeering counts and fifteen (15) of the nineteen (19) racketeering acts in which he was named, and forty-two (42) of the other forty-nine (49) counts submitted to the jury. John Peter Galanis was found not guilty of the seven (7) remaining counts. On September 28, 1988, the Honorable Charles L. Brieant, then Chief Judge, sentenced John Peter Galanis to an aggregate term of imprisonment of twenty-seven (27) years, and a five (5) year term of probation.

After withdrawing his appeal on February 17, 1989, John Peter Galanis moved on June 15, 1989 for a reduction of his sentence pursuant to Rule 35. In a Memorandum and Order dated September 28, 1989, the Honorable Charles L. Brieant, then Chief Judge, granted John Peter Galanis' motion solely to the extent of modifying the Judgment of Conviction to add:

> "Defendant may be released on parole at such time as the Parole Commission or its successor may determine, pursuant to 18 USC Section 4205 (d) (2)."

In arriving at this conclusion, Judge Brieant stated that John Peter Galanis' sentence "should be so structured as to permit the Parole Commission to function within its own discretion, and apply its judgment in the case to the extent it deems proper".

Thereafter, John Peter Galanis, by letter to the Court dated January 8, 1990 requested that the Court's Memorandum and Order dated December 28, 1989, "be deemed and considered by the Court as other than a final order". This was intended to allow John Peter Galanis to bring additional information to the Court's attention as it became available. The government, by letter to the Court, dated January 12, 1990 opposed this request stating that John Peter Galanis had every opportunity to present all the facts and arguments in favor of his Rule 35 Motion and that the merits of the Motion had been fully briefed and commented upon by all the interested parties.

John Peter Galanis, thereafter, submitted a second Motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure dated October 27, 1992 which sought a reduction in his sentence. In this Motion, John Peter Galanis claimed that (1) the Court had retained jurisdiction over his prior Rule 35 Motion; and (2) the Court sentenced John Peter Galanis based on a mistaken impression of when he would be released on parole. Judge Brieant, by a Memorandum and Order dated January 19, 1993 denied the Rule 35 Motion brought by John Peter Galanis on the grounds that

the Court had not retained jurisdiction to grant the sought after relief and that the Motion was time-barred. Judge Brieant, in his Memorandum and Order, stated that John Peter Galanis "has never questioned the legality or the constitutionality of his sentence."

The Instant Motion, dated May 14, 1993 pursuant to Title 28 United States Code, Section 2255, seeks an Order vacating John Peter Galanis' September 28, 1988 sentence claiming that it was imposed in violation of Federal Rules of Criminal Procedure 32 (c) (3) (D).

For the following reasons, I respectfully recommend that your Honor deny this Motion in its entirety.

DISCUSSION

A. COGNIZABLE OR NON-COGNIZABLE CLAIMS

The basis of this Instant Motion is that the sentence imposed on September 28, 1988 should be vacated because of substantive violations of the Federal Rules of Criminal Procedure 32 (c) (3) (D) which John Peter Galanis contends consists of Judge Brieant's failure to make clear findings on alleged disputed allegations which occurred during his sentence.

It is certainly well settled that Section 2255 provides a remedy only for defects which are constitutional,

jurisdictional, or in some other way fundamental. Davis v. United States, 417 U.S. 333, 346 (1974); United States v. Addonizio, 442 U.S. 178, 185 (1979); Reilly v. Warden, FCI Petersburg, 947 F. 2d 43, 44 (2d Cir. 1991), cert. denied, 112 S. Ct. 1227 (1992); Hardy v. United States, 878 F. 2d 94, 98 (2d Cir. 1989); Brennan v. United States, 867 F. 2d 111, 120 (2d Cir. 1989), cert. denied, 490 U.S. 1022 (1989); United States v. Travers, 514 F. 2d 1171, 1177 (2d Cir. 1974). Not every error of law may be successfully asserted pursuant to Section 2255.

The error must be a fundamental one which inherently results in a complete miscarriage of justice. United States v. Wright, 524 F. 2d 1100, 1101 (2d Cir. 1975); Accord Grimes v. United States, 607 F. 2d 6, 10 (2d Cir. 1979); Howard v. United States, 580 F. 2d 716, 720 (5th Cir. 1978).

A violation of a procedural rule in the course of taking a plea or imposing a sentence cannot and should not be the basis of a Section 2255 proceeding. Hill v. United States, 368 U.S. 424 (1963). In Hill, the United States Supreme Court indicated that an alleged failure to allow the defendant to speak at the time of sentence was neither jurisdictional nor constitutional nor a fundamental defect which inherently results in a complete miscarriage of justice and therefore, non-cognizable and inappropriate for a Section 2255 proceeding.

The claim of Mr. Galanis that the Court failed to make clear findings under Rule 32 (c) (3) (D), even if true (to be discussed below), is merely a technical violation and is, therefore, a Non-Cognizable claim which should result in this Instant Motion being rejected.

B. RULE 32 (c) (3) (D) WAS NOT VIOLATED

Even if the claims now by John Peter Galanis could be viewed as being Cognizable, there is no violation of Rule 32 (c) (3) (D) pursuant to the transcript of the sentence. Rule 32 (c) (3) (D) provides in part that:

> If the ... defendant ... allege(s) any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the Court shall as to each controverted matter, make a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing.

With respect to Mr. Galanis' claim concerning the fact that Judge Brieant did not make a finding as to his position concerning an alleged factual inaccuracy in the presentence investigation report concerning Mr. Galanis' Criminal History, a review of the sentencing minutes (Exhibit 5 at Page 20) reflects that the sentencing Court

explicitly stated on the record that it was not considering the disputed facts concerning the defendant's Criminal History and the Judge indicated that he was presuming innocence in the Canadian case and was only going to consider the charge for which he was convicted before him, the verdict, and the proof. Judge Brieant stated:

> "I think to have to make it clear I am presuming his innocence in the Canadian case and I am presuming the correctness of the Second Circuit opinion which denied extradition in the Canadian case. I want to make it clear that the imposition of sentence here rests on the charges of the indictment and the verdict of the jury and the proof at trial." (See Exhibit 5 of Page 20)

With respect to Mr. Galanis' claim concerning the fact that Judge Brieant did not make a finding as to his position on an alleged factual inaccuracy in the presentence investigation report concerning Mr. Galanis' perjury, Judge Brieant explicitly stated that allegations of perjury were not considered and that any sentence he imposed would not be enhanced by reason of perjury. Judge Brieant, at the time of sentence, stated:

> "I think you have to be clear on the fact that the Court cannot and should not enhance its sentence by reason of alleged perjury at trial

> unless the perjury was material and unless I find by a preponderance of the credible evidence that he perjured himself at trial. I am really not prepared to make those findings ... I have to make the record clear and I'm leaving out of my considerations any contentions that he perjured himself insofar as concerns his sentence." (See Exhibit 5 at Pages 16-17)

With respect to Mr. Galanis' claim concerning the fact that Judge Brieant did not make a finding as to his position on an alleged factual inaccuracy in the presentence investigation report concerning Mr. Galanis' manipulation of lawyers and his hinderance of the judicial process, a review of the record indicates that Judge Brieant explicitly stated that the allegations of manipulation of lawyers was not considered. Indeed, in response to the Government's statement that Mr. Galanis' conduct had been contemptuous of the judicial process and the prior injunction and prior sentence of the Court, the Court in sentencing Mr. Galanis, made it clear that those matters were "extraneous to what should really be covered..." (See Exhibit 5 at Page 20).

With respect to Mr. Galanis' claim concerning the fact that Judge Brieant did not make a finding as to his position on an alleged factual inaccuracy in the presentence investigation report concerning Mr. Galanis' claim concerning the size of the fraud and the amount of the loss

suffered by the victims, a review of the sentencing minutes and other documents indicate that it was neither specific nor detailed enough to raise grave doubt as to the veracity of the information actually contained in the presentence report and Judge Brieant's reliance thereon. Herein the defendant, John Peter Galanis, has not raised grave doubt as to the veracity of the information nor has he shown that the Court relied on false information in determining the sentence. Judge Brieant, continually throughout the proceeding for sentence, indicated that he was relying upon the proof adduced at trial over the three (3) month period of time and the verdict by the jury.

With respect to Mr. Galanis' claim concerning the fact that Judge Brieant did not make a finding as to his position on an alleged factual inaccuracy in the presentence investigation report concerning Mr. Galanis' claim regarding the discrepancy as to the degree in which he personally benefited, a review of the sentencing minutes reflects that the defendant failed at the time of sentence to put this matter in issue. Because Mr. Galanis did not raise specific and supported objections to the monetary value and amount by which he personally benefited from the offenses, there was no need for the court to make any specific finding.

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CONCLUSION

Having considered all of Mr. Galanis' claim, I respectfully recommend that this Motion be denied for the reasons set forth herein.

Dated: December 21, 1993
Newburgh, New York

Respectfully submitted,

/s/
Martin R. Goldberg
U.S. Magistrate Judge

Copies of the foregoing Report and Recommendation have been sent to the following:

The Honorable Charles L. Brieant
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